Kemp, 1 OCB2d 43 (BCB 2008)

(IP)(Docket No. BCB-2665-07).

Summary of Decision: Petitioner claimed that the Department of Health and Mental Hygiene violated NYCCBL § 12-306(a)(1) and (3) when it failed to grant her a promotion, allegedly in retaliation for protected activity, filing an out-of-title grievance. The City argued that Petitioner failed to establish that the DOHMH employees with decision-making responsibility for hiring had knowledge of Petitioner's protected activity, and Petitioner also failed to demonstrate that her protected activity was a motivating factor in the decision not to promote her. The City also stated that DOHMH's hiring decision was based on a legitimate business reason and was within the agency's management rights. Following a hearing, the Board found that Petitioner did not establish that DOHMH violated NYCCBL § 12-306(a)(1) or (3). ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

KECIA KEMP,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Respondents.

DECISION AND ORDER

On October 31, 2007, Kecia Kemp ("Petitioner") filed a verified improper practice petition claiming that the Department of Health and Mental Hygiene ("DOHMH" or "Agency") violated the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (3), when it failed to grant her a promotion allegedly

in retaliation for protected activity. Following an evidentiary hearing, this Board finds insufficient factual support for Petitioner's claim that DOHMH acted in violation of the NYCCBL. We find that while Petitioner was able to make a *prima facie* case, the City successfully countered by demonstrating that there was a legitimate business reason for DOHMH's action. Accordingly, Petitioner's improper practice petition in its entirety is denied.

BACKGROUND

A hearing in this matter was held over two days in the instant matter and the trial examiner found that the totality of the record established the relevant facts as follows.[1]

Petitioner has been employed by the DOHMH since September 8, 1997, as a Public Health Advisor ("PHA"). Currently, she serves as a PHA Level II, and she is assigned to the Bureau of Sexually Transmitted Diseases ("STDs") Prevention and Control ("Bureau"). She works at various locations, and her duties involve disease intervention and counseling. While a DOHMH employee, Petitioner took courses relating to her position for which she was awarded Certificates of Completion. Her experience within the Agency includes work in various capacities. In addition to her work for the STDs Bureau, Petitioner detailed her experience as a public health advisor for the Bureau of Asthma Initiative and for the Bureau of Immunization. Both of these positions required that Petitioner work with students in schools. Petitioner also testified that while she was working for the Bureau of Immunization, she supervised nurses who were involved in the medical record-keeping of students being vaccinated.

On or about September 22, 2006, Petitioner and the Union representing those in her title,

[1] At the hearing, testimony was given concerning allegations that Petitioner thereafter withdrew. Such testimony will not be summarized herein.

District Council 37, Local 768, AFSCME, AFL-CIO ("Union") filed an out-of-title grievance in which Petitioner alleged she was doing the work of a Disease Intervention Specialist at the level of a Supervising Public Health Advisor ("SPHA").

On October 3, 2006, Petitioner appealed this grievance to Step II and a hearing on the appeal was held on or about July 20, 2007. The following people attended this hearing: Petitioner and her Union representative Darryl Ramsey; as well as Garry Dodson, DOHMH's Deputy Director of Labor Relations; Steve Rubin, the Deputy Director of the Bureau; and Preston Thomas, Administrative Staff Analyst at the Bureau. At the hearing, Petitioner and Rubin had a discussion about the tasks and duties Petitioner performed, which Petitioner characterized as an argument, and which Dodson characterized as "a little debate of opinions." (Tr. 39, 126-27).[2] Petitioner recounted the following concerning the Step II hearing:

> [Rubin] stated that I only work in the field, and that was what I was stating to him that that is not all I did. But that was his priority there. He said that is what I do, and I was trying to explain that is not all that I did. But he was very abrupt and very nasty toward me. Then Darryl stated to him that he should not be talking to me in that manner, because we were just discussing what I was being asked. . . . He was very harsh in how he was speaking to me. It was more argumentative, like he was trying to provoke me into saying something behind his actions, but I didn't say anything because I didn't know where he was coming from with that. . . . He was upset, because he was saying that my job detailed me being in the field, and that I more or less was lying about what I was actually doing. So I was explaining to him that is not all I do. I said I do most of the time pre- and post-HIV counseling, which it seemed as if he was not aware of. This was the argument. He was telling me what my task was, and it was more or less I was explaining to him that is not how it has been."

(Tr. 37-39).

---

[2] "Tr." refers to citations from the hearing transcript.

On October 22, 2007, Petitioner appealed to Step III; a hearing on this appeal was held on December 12, 2007.

Concurrent with the progression of her grievance, during the summer of 2007, Petitioner applied for an SPHA position in the School STD Testing and Education Program for Urban Populations ("STEP UP"). SPHA is a competitive class title. Generally, the position is geared toward promoting sexual health, reducing STDs, particularly within New York City's high schools. In addition to educational requirements, the job description listed various preferred skills including "[c]ommunity outreach experience; excellent written and oral communication; . . . fluent . . . [in] Spanish or French/Creole preferred; [a New York State] Driver's License; [schedule] flexibility . . .; experience in patient counseling . . .; [and] experience with adolescent population." (City Ex. I). According to one of the interviewers, Sophie Nurani, bilingual Spanish-speaking candidates were preferred because the program services schools with bilingual students, the majority of which speak Spanish. Nurani also stated that the program was "very challenging . . . very physically and emotionally demanding." (Tr. 109-10). Therefore, the interviewers sought candidates with "a high level of commitment," "a high level of energy and enthusiasm," as well as "good interpersonal communication" skills, "good solid knowledge of STDs," "[e]xperience with all the paperwork," and "[r]eliability." (Tr. 109-10).

Petitioner was selected for an interview, and was interviewed by Sophie Nurani and Meighan Rogers. Nurani is Program Director of the School Based STD Testing Program at the Bureau. Meighan Rogers is a Research Scientist and Director of Special Projects at the Bureau. Nurani and Rogers report to Rubin and to Samuel Sebiyam, Program Management Officer for the Bureau.

Nurani testified that Petitioner was selected for an interview because "she looked like a good

candidate. . . . Her resume spoke to her experience with the bureau." (Tr. 120). On July 26, 2007, Rogers and Nurani interviewed Petitioner for the position. The interview took place at 125 Worth Street, which is also the location at which Rubin works. During the interview, the three discussed Petitioner's experience. At some point, Petitioner received a call on her cellular phone. Petitioner testified that she received this call after the interview was completed, and that the call was from her supervisor making a work-related request. Nurani stated that Petitioner answered her phone during the interview, and Nurani further testified that "it did not seem to be an emergency," and that such was "not something that we are used to having happen during job interviews." (Tr. 115). Nurani was not aware of the purpose of the call. Rogers viewed the cell phone call as "inappropriate"; it gave her the impression that Petitioner "was not taking the interview seriously" and led her to believe that Petitioner "lacked the interpersonal and verbal communication skills required to succeed at the [p]osition." (City Ex. A, ¶ 6).

From Petitioner's perspective, "[t]he interview went very well." (Tr. 42). By Nurani's estimation, "[t]he interview was okay." (Tr. 114). Nurani testified that although Petitioner appeared to be a good candidate for the position based on her experience, the interview "took her off from the running for the position." (Tr. 121). Nurani knew that Petitioner had relevant experience with STDs and with patients, however, she did not "perceive [Petitioner] to be particularly excited about working in schools or with youth. . . . I just didn't get a sense of enthusiasm. I felt like she wanted an opportunity to move ahead in the bureau, but not specifically in this program." (Tr. 114). Rogers stated that based upon the interview, she "believed [Petitioner] lacked the leadership necessary to succeed at the [p]osition." (City Ex. A, ¶ 6).

In total, five people were interviewed for this position. After the interviews were completed,

the interviewers recommended two candidates, who were ranked as first-choice and second-choice. Both were bilingual Spanish speakers. Petitioner is not fluent in either Spanish or French Creole. Nurani and Rogers agreed that, out of the five candidates that were interviewed, there were two candidates that they both most preferred. However, within the top two candidates, Nurani and Rogers each preferred a different one. Nurani preferred the candidate ultimately selected as first-choice. By Rogers' estimation, the best candidate was the one ranked as second-choice by the group. At some point before making their recommendation, Nurani and Rogers decided to recommend the candidate that Nurani preferred. Nurani recalled that she and Rogers made the decision to recommend the top candidate for the position, stating "[w]e were really excited about her." (Tr. 112). Rogers stated that her opinion was not the only one involved as "there were multiple people making the decision to offer the position, not just myself. . . . It was a collective decision between myself and Ms. Nurani and our supervisors, Mr. Rubin and Mr.[Sebiyam]. " (Tr. 164).

Concerning the candidate to whom the position was first offered, Nurani stated her impression as follows:

> She just seemed very dedicated to the mission of adolescent health, which like I said, is a priority for us in hiring. She said she had worked in schools before. . . . She likes working in schools. She likes interfacing with school administrators. She enjoys working with youth. She was bilingual and she just seemed very organized and just really interested in the position specifically. She had a tremendous interest in that or seemed to have a tremendous interest in the position, and an understanding of what was required.

(Tr. 112-13).

Sebiyam called the first-choice candidate to offer her the position. That candidate initially accepted, but later declined, notifying Sebiyam that she had taken another position. Sebiyam spoke with the interviewers who told him they desired to go to the next recommended candidate.

Thereafter, Sebiyam offered the position to the second-choice candidate. On August 17, 2007, Nurani notified Petitioner by e-mail that she did not receive the position, stating that Petitioner was a "strong candidate, but in the end we chose someone with a bit more school-based experience." (Petitioner's Ex. 6).

Nurani stated that she and Rogers made their hiring recommendations to Sebiyam, and she never discussed Petitioner's candidacy with Sebiyam. When the first-choice candidate declined the offer, Nurani conversed with Rubin regarding filling the position; she stated that after "we had not had our first choice candidate, we told [Rubin] that we were going to choose our second-choice candidate []. That was pretty much the extent of the conversation." (Tr. 119). Concerning Rubin's involvement in the decision making, and whether approval was required, Nurani stated "[i]t wasn't so formal as getting approval. We just told him that that is who we had decided to go with. He usually trusts our decisions. He doesn't question them." (Tr. 122).

Rogers testified that she recalled speaking with Rubin about the candidates in July 2007, after conducting the interviews, and prior to giving her recommendations to Sebiyam. She stated she did not recall how many conversations she had with Rubin, whether they specifically discussed Petitioner, and did not recall what Rubin said. Concerning Sebiyam's role in the hiring process, Rogers stated "[w]e discussed with him, Nurani and I discussed with him our evaluation of the candidates since we were the ones that interviewed them in person. But he did not, he did not interview them, nor did he make the final decision." (Tr. 168-69). Rogers also stated that she and Nurani collectively decided to offer the position to the first-choice candidate and then to the second-choice candidate, and they "recommended that to Mr. Rubin." (Tr. 170). She stated she did not "specifically remember what he said, but [she did] remember just that he agreed or said that that was

fine." (Tr. 170).

Petitioner testified that "[s]ince I have been working with the Bureau of STD and I used to work down in surveillance as well where the interview was located at. I am very well aware that they talk about the workers." (Tr. 71). Petitioner claimed that Nurani "probably would know" about out-of- title grievances within the Bureau of STD Testing because "Steve Rubin is over her[]." (Tr. 68). Therefore, "[m]ore than likely it was" brought to Nurani's attention when a job applicant has filed an out-of-title grievance. (Tr. 69). Nurani testified that she is generally not aware of out-of-title grievances within the Bureau; she first became aware of Petitioner's out-of-title grievance about a month before the hearing in this matter, when the City's attorney contacted her; she stated she was not aware of the grievance when she interviewed Petitioner. Petitioner also claimed that Rogers' job duties included knowing about out-of-title grievances because she also works under Rubin. Rogers stated she was not aware of Petitioner's out-of-title grievance until June 2008 when she was contacted by the City's attorney asking her to testify regarding this improper practice proceeding.

Sebiyam testified that he is in charge of personnel activities within the Bureau, including hiring and out-of-title grievances. Sebiyam reports directly to Rubin. Concerning the candidate selection process, Sebiyam stated that when a position is open in a unit, the unit head performs the interviews to fill the vacancy. After the interviews are conducted, the unit head recommend candidates for the position. Then, Sebiyam calls the highest recommended candidate and offers that person the position. Sebiyam stated he follows the interviewer's recommendations "[a]ll the time;" he elaborated:

> Most of the time, yes all the time. Whatever they recommend, they will give it to me. I follow what their recommendations are. I don't see any reason why I would not follow the interviewer's recommendations. There haven't been any instance where we

> diverted from that pattern. I go according to what the recommendations are.

(Tr. 132).

Here, Sebiyam recalled that the interviewers checked their first-choice and second-choice candidates as "recommended," and he recalled that Petitioner was checked "not recommended." (Tr. 145-46). Sebiyam stated that he was aware of Petitioner's out-of-title grievance during the selection process to fill this vacancy, but this knowledge did not influence his decision to accept their recommendation. When Sebiyam gave the resumes to the interviewers for their consideration, he did not discuss Petitioner with them. Sebiyam testified that Rubin is his supervisor to whom he reports directly, and that he spoke with Rubin about the decision to open this position, but he did not talk to Rubin between the time that the interviewers made their recommendations and his offering the position to the first-choice candidate. Sebiyam further testified that Rubin never directed him to ensure that Petitioner not receive a promotion because she filed a grievance. In response to direct examination inquiring whether Rubin had ever told him that Petitioner would "suffer or pay for filing an out-of-title grievance," or that "it would affect her employment with DOHMH or her ability to get a promotion," Dodson stated that Rubin had not told him such things. (Tr. 126-27).

According to Petitioner, her supervisors advised her regarding her employment at the Agency. She claimed that Bernard Lindsay, her supervisor at the Chelsea Clinic, told her she should look elsewhere for employment:

> He would just tell me, you know, because I was applying for outside positions, to go ahead and apply for the positions and that he wished me well in whatever I do. More or less he didn't want to elaborate on whatever was going on. That there was something going on.

(Tr. 54-55).

Petitioner also claimed that Vernon Pressley, Regional Consultant at the Bureau, told her that

DOHMH would not hire her for a supervisory position, so she might like to look outside the Agency for employment, stating Pressley "had once recommended me for a supervisory position, but whomever he was speaking with downtown, which he told me was his boss, he said that they weren't going to hire me." (Tr. 52). According to Petitioner, Pressley told her that she had "no future" there and the Agency would never hire her for a position because she was "blackballed." (Tr. 54). Petitioner stated Pressley recommended that she speak with Rubin; she stated that Pressley told her "because I am not stroking Steve Rubin, that that is why I am not being hired for a higher position. More or less he was telling me, you have to learn how to play the game, and you have to know how to stroke." (Tr. 53). Finally, Petitioner asserted that:

> [Pressley] has come to me on more than one occasion, because of the fact that he knew about the grievance and he was stating to me that I should go downtown and try to talk with Steve. . . . At the time, I can't recall word for word the reason for me to go speak with him. But he felt that that was the person that I needed to talk to.

(Tr. 55).

POSITION OF THE PARTIES

Petitioner's Position

Petitioner alleges that DOHMH violated NYCCBL § 12-306(a)(1) and (3)[3] when it denied

---

[3] NYCCBL § 12-306(a) provides in pertinent part:

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter. . .
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the

her the opportunity to be promoted because she filed a contractual grievance.[4] DOHMH interviewed her for the SPHA position; however, despite her 11 years of service for the Agency and degrees including a Bachelor of Science in Community Health Education and a Masters in Public Administration, Petitioner was ultimately denied the position because DOHMH deemed her a "troublemaker."

In support of her claim, Petitioner points to the way that Rubin treated her at the Step II grievance hearing, as well as to the fact that her supervisors told her that "because she crossed Steve Rubin, she will never get ahead in this agency." (Tr. 7). Petitioner also notes the temporal relationship between the grievance meeting and the interview; specifically, one week's time passed between the former and the latter. Petitioner asserts she was well qualified for the position, and that "[i]t is hard to believe that Rubin did not play a determinative role in [the] decision [not to promote her], a week after a hearing had to be abruptly adjourned because Rubin lost his temper at Kemp." (Petitioner's Br. at 8). Finally, the employer's witnesses gave inconsistent testimony concerning the reasons she was denied the promotion; if the hiring decision was made strictly on the merits, the witnesses would not give such different accounts of the matter.

---

activities of, any public employee organization.

NYCCBL § 12-305 provides, in relevant part:

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

[4] In her petition, Petitioner alleged that DOHMH failed to grant her a promotion into any of the 105 positions for which she applied. Thereafter at the hearing, Petitioner limited her petition to the one position discussed herein.

City's Position

The City argues that the Petitioner has not alleged sufficient facts to establish her claim, and therefore the petition should be dismissed. Although the City concedes that Petitioner engaged in protected activity by filing her out-of-title grievance, the City contends that Petitioner failed to establish that the DOHMH employees that the City believes are relevant to the hiring decision-making process, namely interviewers Nurani and Rogers, knew of her protected activity. Assuming Petitioner had established knowledge, she has not demonstrated that her protected activity was a motivating factor in DOHMH's decision not to promote her. Finally, DOHMH offered the position for which Petitioner applied to candidates who had characteristics that Petitioner lacked, namely bilingual skills and prior supervisory experience. Therefore, DOHMH's action was based on a legitimate business reason, and was within its management rights.

DISCUSSION

The issue in this matter is whether DOHMH's decision not to promote Petitioner to the SPHA position was made in retaliation for her Union activity of filing an out-of-title grievance in violation of the NYCCBL. After reviewing the record, we find that Petitioner established a *prima facie* case of retaliation. We also find that while the City was unable to refute Petitioner's *prima facie* showing, it did establish that its decision was made based upon a legitimate business reason.

In order to determine whether an employer has violated NYCCBL § 12-306(a)(1) and (3), we employ the following test, requiring a petitioner to establish a *prima facie* case by demonstrating that:

> 1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and

> 2. The employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19 (BCB 1987) applying *City of Salamanca,* 18 PERB ¶ 3012 (1985); *DC 37*, 1 OCB2d 6, at 27 (BCB 2008).

If a petitioner successfully makes a *prima facie* case, "the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct." *DC 37,* 1 OCB2d 5, at 64 (BCB 2008) quoting *SBA*, 75 OCB 22, at 22 (BCB 2005); *see Lamberti,* 77 OCB 21, at 17-20 (BCB 2006).

Petitioner has demonstrated the first element of the *Bowman/Salamanca* test. In keeping with this Board's prior holdings, the City concedes that Petitioner's act of filing an out-of-title grievance constitutes protected activity. *DC 37*, 1 OCB2d 6, at 28 (BCB 2008). Further, it is clear from the record that some of the agents involved in the hiring decision were aware of Petitioner's grievance. Several people were involved in the hiring process; Nurani and Rogers together conducted the interviews and thereafter made hiring recommendations to Rubin and Sebiyam. Although Petitioner alleges that the interviewers were both aware of her grievance during the hiring process, we find that both interviewers testified credibly that they had no knowledge of Petitioner's protected activity at that time and only became aware of the grievance when contacted to testify in this matter. Nonetheless, it is unrefuted that Rubin and Sebiyam, to whom the interviewer's recommendations were given, were both aware of Petitioner's grievance. Accordingly, Petitioner has demonstrated that at least some of the agents involved in the decision not to promote her were aware of her grievance.

Regarding the second element, which requires evidence of a causal relationship between the protected activity and the alleged adverse action, "typically, this element is proven through the use of circumstantial evidence, absent an outright admission." *DC 37*, 1 OCB2d 5, at 65 citing *Burton*, 77 OCB 15, at 26 (BCB 2006). "[A]llegations of improper motivation must be based on statements of probative facts." *Id.,* quoting *Ottey*, 67 OCB 19, at 8 (BCB 2001). Petitioner testified that Rubin was hostile towards her during the grievance meeting, in that he was "very abrupt," "very nasty," "very harsh," and "upset." Given that Rubin's actions and alleged animus are central issues in this matter, it is notable that the City did not call him to testify concerning the grievance meeting. *See UFA*, 1 OCB2d 10, at 17-20 (BCB 2008) (discussing the circumstances under which an adverse inference may be drawn based upon the absence of a pertinent witness). Moreover, Petitioner testified that two of her supervisors told her that DOHMH would not hire her for a supervisory position and advised her to look elsewhere for employment. The City did not challenge Petitioner's testimony concerning these supervisors' statements, and did not present the supervisors to testify. *See id.* Such allegations made by Petitioner, and unrefuted by the City, weigh in favor of a finding that Petitioner has established the second element of her *prima facie* case.

"[A] petitioner may attempt to carry its burden of proof as to the causation prong of the *Salamanca* test by deploying evidence of proximity in time, together with other relevant evidence." *Feder*, 1 OCB2d 27, at 17 (BCB 2008) (internal quotations omitted). In this case, the timing of events weighs in Petitioner's favor: the Agency's hiring decision was made within the period during which Petitioner's grievance was being processed. More specifically, the grievance hearing and the job interview at issue fell within a week's time. After considering the above, we find that Petitioner has made a *prima facie* case that her protected activity was a motivating factor in the Bureau's hiring

decision, thereby warranting the City's rebuttal. *See Feder,* 1 OCB 27, at 16-17; *Collella ,*79 OCB 27, at 58, *et seq*. (BCB 2007); *DEA*, 79 OCB 40, at 25-26 (BCB 2007).

As discussed above, after a petitioner establishes a *prima facie* case, the burden shifts to the employer. *DC 37,* 1 OCB2d 5, at 64; *Lamberti,* 77 OCB 21, at 18. The employer may counter the petitioner's showing by directly refuting the evidence used to establish the elements of the *prima facie* case or "by demonstrating that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct." *Lamberti,* 77 OCB 21, at 18.

In the instance case, we find that while the City failed to refute the *prima facie* case, it did establish a legitimate business reason for DOHMH's action. The City's effort to refute Petitioner's *prima facie* case presumes that the interviewers Nurani and Rogers were the agents responsible for the hiring decision. Based on this presumption, the City argues that, because the sole decision makers were unaware of Petitioner's protected activity, the decision could not be motivated by protected activity. This presumption, however, is not supported by the record. Both interviewers testified that Rubin and Sebiyam were involved in the hiring decision in some capacity, although the extent of their involvement is unclear. Most notably, Rogers referred to the hiring determination involving herself, Nurani, Sebiyam and Rubin as a "collective decision." (Tr. 164). As it is undisputed that Sebiyam and Rubin were both aware of Petitioner's out-of-title grievance, this testimony undercuts the City's argument that no agents involved in the hiring decision had knowledge of Petitioner's protected activity. While Sebiyam's testimony on the matter appears to reflect that his role was largely ministerial, there is no such evidence regarding Rubin's involvement. Moreover, on the issue of motivation, we find it notable that the City did not call the two supervisors

to testify who, according to Petitioner, intimated that she was "blackballed," even though they are presumably within the City's control.

However, we also find that the City has demonstrated that it had legitimate business reasons for denying Petitioner a promotion. The City showed that bilingual skills, specifically Spanish or French Creole, would be useful in this position. The job description for the position noted Spanish or French Creole ability were preferred skills, and Nurani testified that a majority of the bilingual students serviced by the program spoke Spanish. Further, the City showed that the two candidates who were offered the position both have Spanish language ability while Petitioner does not.[5]

In addition, both interviewers underscored Petitioner's behavior during the interview, particularly her decision to answer her cellular phone. While Petitioner testified that the phone call came after the interview, there is no dispute that Petitioner answered her phone without explanation while still in the presence of the interviewers. Both interviewers cited this action as a basis for their opinions concerning the strength of Petitioner's interest in the position and her interpersonal skills. In addition, we credit Sebiyam's unrefuted testimony that he always follows the recommendation of the interviewers. Notwithstanding his knowledge of Petitioner's grievance, we find that such

---

[5] Petitioner has highlighted and we are aware that the interviewers Nurani and Rogers had varying recollections of the hiring process. However, on important material facts, their testimony was consistent and we find it credible, particularly as witness testimony may still be of value despite "minor inconsistencies." *See Estate of Theresa Gervasio*, 2008 N.Y. Misc. LEXIS 641, at *4 (N.Y. Sur. Ct. 2008) (summary judgment may be granted on the basis of testimony containing "minor inconsistencies" in the witnesses' recollection); *see also Bhuiyan v. Gonzales*, 231 Fed. Appx. 28, 31 (2d Cir. 2007) ("minor and isolated" inconsistencies in the record are "an insufficient basis for [an] adverse credibility determination") (internal quotations omitted). While it is not clear how the interviewers came to consensus about which of their top two candidates to offer the position first, it is evident that both of these candidates received higher consideration than the others. More importantly, the interviewers were in agreement that Petitioner was neither their first choice nor their second choice.

knowledge did not affect Sebiyam's actions in offering the position to one, and then the other, of the interviewers' two top recommended candidates.

We find that these business reasons demonstrated by the City to explain why Petitioner did not receive the promotion are legitimate; Petitioner's lack of bilingual skills and her interview performance go to the crux of her apparent suitability for the position in question relative to competing candidates. Therefore, we find that the City has established that even if some evidence existed that Petitioner's protected activity was "a motivating factor" in the decision to not promote her, the decision would have been made regardless of such factors based on Petitioner's lacking the objective criteria sought for the position and based on her conduct during the interview. *See Lamberti*, 77 OCB 21, at 19-20.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition filed by Kecia Kemp docketed as BCB-2665-07 be, and the same hereby is denied.

Dated: New York, New York
December 17, 2008

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER